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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CLARA FRATICELLI, *et al.*,
Petitioners,

v.

THE DOW CHEMICAL COMPANY, *et al.*,
Respondents.

GERALD HOGAN,
Petitioner,

v.

THE DOW CHEMICAL COMPANY, *et al.*,
Respondents.

In re "Agent Orange" Product Liability Litigation

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WAYNE MICHAEL MANSULLA
(Counsel of Record)
CHRISTOPHER VINCENT TISI
ASHCRAFT & GEREL
2000 L Street, N.W., Suite 700
Washington, D.C. 20036
(202) 783-6400

Counsel for Petitioners

CASILLAS PRESS INC. – 1717 K STREET NW WASHINGTON DC 20036 – 223-1220

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QUESTIONS PRESENTED

I. Do the federal interests underlying federal class action procedure and this Court's decision in *American Pipe and Construction Co. v. Utah,* 414 U.S. 538 (1974), require a uniform federal rule that the commencement of a class action in federal court tolls the applicable statute of limitations as to all asserted class members regardless of whether those limitations periods are derived from federal law or state law?

II. Did the Court of Appeals improperly modify the class action tolling rule of *American Pipe* by determining that the petitioners were not part of the class ultimately certified by the District Court in 1983, rather than by determining whether these petitioners were part of the proposed class as defined in the class action complaint filed in 1979?

III. Does the "discretionary function" exception to the Federal Tort Claims Act insulate the United States from liability for injuries which are caused by governmental acts which are purely operational in nature?

IV. Did the dismissal of Gerald Hogan's Complaint pursuant to Rule 37(b) of the Federal Rules of Civil Procedure violate Dr. Hogan's Fifth Amendment rights, where the court had less severe sanctions available to it and where the predominant reason for affirming dismissal was to deter others from ignoring discovery orders?

V. Did the Second Circuit commit error when it failed to address the petitioners' challenge to the district court's standard for summary judgment on the issue of whether Agent Orange caused the injuries alleged by the plaintiffs?

VI. Can a private manufacturer that contracts with the government to produce a product for military use be immune from tort liabiliity?

PARTIES BELOW

The Parties to the proceedings below, as required by Supreme Court Rule 28.1, are the petitioners, James K. Oshita, Masao Takatsuki, Clara Fraticelli, individually and as the representative of the estate of her husband, William J. Fraticelli, Dr. Gerald Hogan and the respondents, Dow Chemical Company, Monsanto Company, Hercules Incorporated, T H Agriculture & Nutrition Company, Inc., Uniroyal, Inc. and the United States of America.

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In re "Agent Orange" Product Liability Litigation

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners, James K. Oshita, Masao Takatsuki, Clara Fraticelli, individually and as representative of the estate of her husband William J. Fraticelli, and Gerald Hogan respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above titled proceeding on April 21, 1987.

OPINIONS BELOW

The decision of the United States District Court for the Eastern District of New York (Weinstein, Ch. J.) in the case of *Fraticelli v. Dow* is reported at 611 F. Supp. 1285, and is reprinted in the Single Appendix submitted with this petition, p. 621a.

The decision of the United States District Court for the Eastern District of New York (Weinstein, Ch. J.) in the Case of *Gerald Hogan v. Dow* is reported at 611 F. Supp. 1290, and is reprinted in the Single Appendix submitted with this petition, p. 630a.

The opinion of the United States Court of Appeals for the Second Circuit is reported at 818 F.2d 210, and is reprinted in the Single Appendix submitted with this petition, p. 766a.

The order of the Court of Appeals for the Second Circuit denying plaintiffs' peitition for rehearing was issued on June 3, 1987 and is reprinted in the Single Appendix submitted with this petition, p. 779a.

The orders of the Court of Appeals staying issuance of the mandate pending petition for a writ of certiorari is reprinted in the Single Appendix submitted with this petition, p. 782a.

STATUTES AND RULES INVOLVED

Rules 23(c)(1) and 37(b) of the Federal Rules of Civil Procedure and of the statutes 28 U.S.C. §§ 1346(b), 2674 and 2680(a) are involved and their texts are appended to this petition.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The decision of the court below was issued on April 21, 1987. A timely petition for rehearing

En Banc was filed, and was denied on June 3, 1987. On July 17, 1987, the Court of Appeals stayed the issuance of the mandate until August 7, on the condition that a petition for writ of certiorari be filed on or before that date. On August 7, the Court of Appeals continued the stay of the issuance of the mandate until such time as the United States Supreme Court rules on the petition for certiorari.

STATEMENT OF FACTS

[A] Introduction

Both *Fraticelli v. Dow* and *Hogan v. Dow* present issues stemming from various claims for personal injuries sustained as a result of exposure to dioxin. Dioxin, one of the most toxic substances ever produced by man, is a byproduct of several phenoxy herbicides manufactured by the respondent chemical companies to defoliate the jungles of Vietnam during the Vietnam conflict. The first set of claims, *Fraticelli v. Dow,* involves the case of three residents of Hawaii: Clara Fraticelli, for herself and for her deceased husband William Fraticelli, James K. Oshita and Masao Takatsuki. (The "Hawaiian Petitioners"). The second case, *Hogan v. Dow,* represents the claim of Doctor Gerald Hogan, a resident of Nevada. Although each of these cases present different issues, they are considered together by the United States Court of Appeals for the Second Circuit. *In re "Agent Orange" Product Liability Litigation,* 818 F.2d 210 (2d Cir. 1987) (App. p. 766a)*

*Because several petitions for a Writ of Certiorari are being filed in the "Agent Orange" Cases, the petitioners in this case have joined with other petitioners in filing a single appendix. That appendix contains all of the relevant decisions and orders of the Circuit Court and the District Court and references to it are designated as ("App. p. ____").

Throughout the text of this petition, references will also be made to the joint appendix which was before the Second Circuit. References to that appendix will be designated as "J.A. ____."

[B] The Hawaiian Petitioners

In 1967, James K. Oshita, Masao Takatsuki and William J. Fraticelli were employed by the University of Hawaii's College of Tropical Agriculture and Human Resources on the island of Kauai. At that time, the University of Hawaii was under contract with the United States government for the testing of several phenoxy herbicides, including "Agent Orange." The herbicides tested are alleged to have been manufactured by the respondent chemical companies.

According to the histories given by Mr. Oshita and Mr. Takatsuki, they and Mr. Fraticelli were exposed on several occasions to Agent Orange. According to their recollection, they were sprayed with Agent Orange while they were driving tractors at the experimental station at the university. They report that they were "drenched" with the herbicide on at least three separate occasions and were constantly exposed to the chemical, which was sprayed on immediately adjacent lots.

William Fraticelli died in April of 1981 as a result of lung and kidney cancer. In 1978, Masao Takatsuki was diagnosed as having cancer involving the tongue and floor of the mouth. In 1971, James Oshita had surgery to remove cancer of his bladder. Both Oshita and Takatsuki claim to have suffered from chloracne at various times since 1967. Chloracne has been definitively linked to Agent Orange exposure.

All three of these petitioners filed workers' compensation claims with the Hawaii Department of Labor claiming that there was a causal connection between their respective illnesses and their exposure to phenoxy herbicides. Mr. Fraticelli's claim was filed on October 1, 1979 and he claimed to have first discovered the cause of his illness in September of 1979. Mr. Takatsuki filed his claim on Janu-

ary 7, 1981, having first obtained knowledge of the cause in January of 1979. Mr. Oshita filed his claim on July 12, 1979, having first gained knowledge in July, 1979. The State of Hawaii Department of Labor accepted liability for the claims.

On January 26, 1979, Thomas Edward Skillings filed a class action complaint in the United States District Court for the Southern District of New York. That complaint was filed by Mr. Skillings "on behalf of all those so unfortunate as to have been and now to be similarly situated at risk, from the toxic effects of phenoxy herbicides." J.A. 1196. The definition of the proposed class contained in the class action allegations made no reference to either the Vietnam War or Vietnam War Veterans.

On January 16, 1979, Counsel for the Hawaiian Petitioners entered into agreement with the Agent Orange Plaintiffs' Management Committee ("PMC") to join the Agent Orange Product Liability Litigation, Multidistrict Litigation 381 ("MDL 381"). On July 18, 1979, the then District Court Judge responsible for MDL No. 381, the Honorable George C. Pratt, ruled that "all applicable statutes of limitations have been tolled . . . from the filing of the first class action complaint." *In re "Agent Orange" Product Liability Litigation,* 475 F. Supp. 928, 937 (E.D.N.Y. 1979). He also ruled that "it may be unnecessary for additional parties to file new complaints in this litigation." *Id.* The Hawaiian plaintiffs' counsel did not file a complaint for the next three years, expressing his view to the PMC that his clients' interests were being protected by the class action status of the Agent Orange litigation.

In 1980, Judge Pratt issued an opinion in MDL 381 in which he conditionally certified the class along the broad lines set out in the Skillings complaint. According to the

court, the class consisted of all "persons who claim injury from exposure to 'Agent Orange'." *In re "Agent Orange" Product Liability Litigation,* 506 F. Supp. 762, 788 (E.D.N.Y.), *rev'd on other grounds,* 625 F.2d 987 (2d Cir. 1980). Judge Pratt explicitly stated his intention to "define the class in broad terms." Although he reserved the right to "create subclasses" at a future date, the district court never defined subclasses and, on January 11, 1982, the Hawaiian plaintiffs protectively filed their complaint. The Multidistrict Litigation Panel then transferred petitioners' action to the Eastern District of New York.

Subsequent to the filing of Petitioners' Complaint, the District Court formally certified the class. The Honorable Chief Judge, Jack B. Weinstein, who took over MDL 381 in 1983 from Judge Pratt, defined the class as former members of the United States, Australia and New Zealand armed forces who served in Vietnam and their families who claim injury as a result of exposure to phenoxy herbicides. *In re "Agent Orange" Product Liability Litigation,* 100 F.R.D. 718, 729 (E.D.N.Y. 1983) *mandamus denied sub nom., In re Diamond Shamrock Chemical Co.,* 725 F.2d 858 (2d Cir.), *cert. denied,* ____ U.S. ____, 104 S.Ct. 1417 (1984). On July 24, 1984, the respondent chemical companies moved for summary judgment on the issue of causation. On April 9,1985, the respondent Dow Chemical Company filed a second Motion for Summary Judgment arguing that all of the Hawaiian petitioners' claims (except the wrongful death claim of Clara Fraticelli) were barred by Hawaii's two-year statute of limitations on personal injury lawsuits.

In 1985, the district court issued an opinion granting both of defendants' motions for summary judgment. With regard to the statute of limitations defense, the court concluded that the latest date that the petitioners could have

"discovered" the connection between their injury and Agent Orange under Hawaii's discovery rule was September, 1979. *In re "Agent Orange" Product Liability Litigation,* 611 F. Supp. 1285, 1289 (E.D.N.Y. 1985). Without ever considering whether the statute of limitations was tolled, the court concluded that the petitioners' claims were time-barred. *Id.* Judge Weinstein also granted summary judgment on the basis of lack of causation. *Id.*

The United States Court of Appeals for the Second Circuit specifically did not address the issue of causation on appeal. It did, however, affirm the dismissal of petitioners' claims against the chemical companies on the basis of the statute of limitations. *In re "Agent Orange" Product Liability Litigation,* 818 F.2d 210, 213 (2d Cir. 1986). The Court then unilaterally undertook to dismiss the petitioners' claims against the United States on the basis of the "discretionary function" exception to the Federal Tort Claims Act. *Id.* at 214.

[C] Doctor Gerald Hogan

Like the Hawaiian petitioners, Dr. Hogan has claimed injuries as a result of his exposure to dioxin. Unlike the Hawaiian petitioners, however, Dr. Hogan was exposed while in Vietnam.

In July of 1966, Dr. Hogan joined the United States Agency for International Development. He agreed to serve as a surgeon in a civilian hospital in Da Nang, South Vietnam. He claims exposure to phenoxy herbicides through the constant dust in the air and contact with patients and their soiled clothing. While in Vietnam, his near perfect health began to deteriorate. He developed, among other things, hemi-parkinson syndrome, weakness in his extremities, and an acne-like rash on his face.

Dr. Hogan instituted his suit on January 29, 1981 in the Second Judicial District of Nevada. His case was removed to federal court and then transferred to the Eastern District of New York as part of MDL No. 381.

As a result of his deteriorating health, Dr. Hogan has been forced to live in a bleak and sterile home outside Las Vegas, Nevada. All plastics in his home have been covered with tin foil to prevent "off gassing." He normally leaves Las Vegas in early March to escape the pollution which occurs in the summer and moves to Death Valley, California.

Dr. Hogan's deposition was scheduled for March 21, 1985. He had postponed leaving Las Vegas for Death Valley in order to have this deposition taken. After approximately two and one half hours of deposition, Dr. Hogan adjourned the deposition due to cardiac arrhythmia. At a hearing before the magistrate in charge of discovery, Dr. Hogan requested that his deposition be suspended indefinitely or for at least six weeks. He submitted an affidavit of a former treating physician, who opined that it would be injurious to Dr. Hogan's physical and mental well-being to continue his deposition until he was strong enough to withstand further questioning.

At the respondent's request, Dr. Hogan submitted himself for examination by a defense expert. This expert concluded that Dr. Hogan could continue his deposition. Accordingly, the magistrate ordered that Dr. Hogan continue his deposition for one day on April 4, 1985. On April 3, 1985, Dr. Hogan expressed his concern that he was physically unable to continue his deposition and cancelled the deposition scheduled for the next day.

The respondents moved to dismiss Dr. Hogan's claim on April 8, 1985 pursuant to Rule 37(b) of the Federal Rules

of Civil Procedure. The District Court granted the respondent's motion and further held that, if his case were not so dismissed, it would have to be dismissed on the causation issue. *In re "Agent Orange" Product Liability Litigation,* 611 F. Supp. 1290 (E.D.N.Y. 1985). Without reaching the causation issue, the United States Court of Appeals for the Second Circuit affirmed Dr. Hogan's Rule 37(b) dismissal. 818 F.2d at 212.

REASONS FOR GRANTING THE WRIT

I.

THE HAWAIIAN PETITIONERS

[A] The Second Circuit's Suggestion That The Class Action Tolling Rule Of *American Pipe And Construction Co. v. Utah* Does Not Apply Unless The Underlying Statute Of Limitations Is Federal, Conflicts With Several Decisions Of This Court And Ultimately Undermines Rule 23 Of The Federal Rules Of Civil Procedure.

The petitioners argued below that the statute of limitations on their claim for personal injuries was tolled by the filing of the Agent Orange class action complaint of Thomas Edward Skillings in the Southern District of New York. In support of this position, the petitioners relied on the tolling rule announced by this Court in *American Pipe and Construction Co. v. Utah,* 414 U.S. 538 (1974), and affirmed most recently in *Crown, Cork and Seal Co., Inc. v. Parker,* 462 U.S. 345 (1983). According to this Court in *Crown, Cork:*

> the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been par-

> ties had the suit been permitted to continue as a class action.

Id. at 353-354, *citing American Pipe,* 414 U.S. at 554.

Despite the apparent clarity of that rule, the Court of Appeals below expressed serious doubt about the application of *American Pipe* and *Crown, Cork* to a class action, such as this, where the applicable statute of limitations is not federal. According to that Court:

> the limitations periods of *American Pipe* and *Crown, Cork* were derived from Federal Statutes. Here, we are dealing with Hawaii's limitation statutes. Because none of them provides for tolling in a situation such as exists here, it is doubtful that either *American Pipe* or *Crown, Cork* can be treated as applicable precedent. *See, Chardon v. Fumero Soto,* 462 U.S. 650, 660-62, 103 S. Ct. 2611, 2618-19, 77 L.Ed.2d 74 (1983); *Board of Regents v. Tomanio,* 466 U.S. 478, 483-86, 100 S.Ct. 1790, 1794-96, 64 L.Ed.2d 440, (1980); *Johnson v. Railway Express, Inc.,* 421 U.S. 454, 466-67, 95 S.Ct. 1716, 1723, 44 L.Ed. 2d 295 (1975).

In re "Agent Orange" Product Liability Litigation, 818 F.2d 210, 215 (2d Cir. 1987) (App. p. 770a-71a). The Court, however, stopped short of whole-heartedly endorsing that restrictive and unjustified reading of *American Pipe* and *Crown, Cork* because of what it termed

> Justice Rehnquist's categorical statement in his *Chardon* dissent that '[i]f the law of a particular state was that the pendency of a class action did not toll the statute of limitations as to unnamed class members, there seems little question but that the federal rule of *American Pipe* would nonetheless be applicable'.

Id., citing 462 U.S. at 667 (Rehnquist, J. dissenting.) Assuming, as the lower Court did, that the State of Hawaii does not have an applicable tolling rule,[1] the Court below raised significant questions of whether a putative class member in a diversity-type class action can rely on this Court's interpretation of Rule 23 contained in *American Pipe* and *Crown, Cork.*

In *Crown, Cork,* this Court reiterated the important federal policy which underlies Rule 23's requirement that all applicable statutes of limitations be tolled. The Court noted that without a tolling rule:

> a putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations. The result would be a needless multiplicity of actions — precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid.

462 U.S. at 350-51. It is clear that these policies apply to *all* class actions brought under Federal Rule 23, whether the applicable statute of limitations is federally derived or whether, as in this case, the statute of limitations is derived from state law.

In refusing to flatly acknowledge the controlling effect of *American Pipe,* and *Crown, Cork,* the court below cited this Court's opinion *Chardon v. Fumero Soto,* 462 U.S. 650 (1983). Contrary to the suggestion of the court below, however, *Chardon* does not conflict with *Crown, Cork* and *American Pipe.* The question presented in *Char-*

[1] The Court of Appeals' assumption, however, was misplaced. *See* discussion of *Levy v. University of Hawaii,* 67 Hawaii 90, 679 P.2d 129 (1984), *infra* at 12-13.

don was *not* whether the applicable statute of limitations is tolled when a class action complaint is filed in Federal Court. That fact was settled. 462 U.S at 652. Rather, the *only* question addressed in *Chardon* was whether the "effect of the tolling" is derived from state law. *Id.*[2] In holding that state law controls the effect of the tolling, the Court noted that

> *American Pipe* simply asserts a federal interest in assuring the efficiency and economy of the class action procedure. *After* class certification is denied, that federal interest is vindicated as long as each unnamed plaintiff is given as much time to intervene or file a separate action as he would have under a state savings statute . . . or . . . [the] state tolling statute.

Id. at 661 (emphasis added). Thus, the Court in *Chardon* simply found that there was no federal interest served by imposing a uniform rule about the *effect of the tolling.* That holding, however, in no way altered this Court's finding in *American Pipe;* namely, that there is a federal interest behind Rule 23 which is served by *tolling* the applicable statute of limitations.

In any event, even if the Court of Appeals was required to look to Hawaiian Law, it need not have "assumed for the purpose of litigatory efficiency" that the *American Pipe - Crown, Cork* Rule applies. 718 F.2d at 213 (App. p. 771a), *citing, Johnson,* 421 U.S. at 467, n.12. Quite apart from the accuracy of Justice Rehnquist's statement in

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[2] The *Chardon* Court took great pains to distinguish these two concepts. According to the Court, the word "tolling" simply meant that "during the relevant period, the statute of limitations ceases to run." 462 U.S. at 654 n.1. "Tolling effect," on the other hand, meant "the method of calculating the amount of time available to file suit *after tolling has ended." Id.* (emphasis added)

Chardon, the Hawaii Supreme Court has specifically adopted the rationale of *American Pipe* and *Crown, Cork* as part of its own state tolling rules. *Levy v. Hawaii,* 67 Hawaii 90, 679 P.2d. 129 (1984). In this regard, the Hawaii Supreme Court could not have been more clear:

> we . . . adopt the rule enunciated in *American Pipe and Construction v. Utah,* 414 U.S. 538, 94 S. Ct. 756, 38 L.Ed.2d 713 (1974) and clarified in *Crown, Cork and Seal, Co., Inc. v. Parker,* ____ U.S. ____, 103 S.Ct. 2397, 76 L.Ed. 628 (1983) which states that the commencement of a class action suspends the applicable statute of limitations as to all members of the class . . .

Id. at 132. Thus, even if the Court below was correct in suggesting that state law controls this question, the rule of *American Pipe* and *Crown, Cork* would nonetheless be applicable.

The Second Circuit's opinion below has thus created a very confusing precedent. It limited this Court's precedents in *American Pipe* and *Crown, Cork* in a manner that is both illogical and unjustified. Because of the high visibility of this case, the opinion below will undoubtedly have great impact on future class action procedure in all federal courts. The result, if not corrected, will be a needless proliferation of complaints by plaintiffs who wish to avoid the possibility of dismissal. Because of the need for procedural uniformity in federal class action procedure, this Court's review is warranted.

[B] The Second Circuit's Holding That These Petitioners Were Never Part Of The Agent Orange Class Action Conflicts With This Court's Holding In *American Pipe* And *Crown, Cork.*

The Second Circuit Court of Appeals determined that *even if* this Court's *American Pipe* and *Crown, Cork* decisions *could* be applied in the context of this state law based class action, these particular petitioners would nonetheless be unable to invoke the tolling rule. According to the court below, the statute of limitations could not be tolled on the petitioners' claims because "these Hawaiian plaintiffs *never became* part of [the principle Agent Orange class action]." 718 F.2d at 213 (App. p. 771a) (emphasis added). The question, however, is not whether the Hawaiian petitioners ever became part of the principal class action as ultimately defined. It is clear that they did not.[3] Rather, the proper inquiry is the one formulated by this Court; namely, whether these petitioners are members of the class "who *would have been* parties to the suit had the suit been permitted to continue as a class action." *American Pipe,* 441 U.S. at 554 (emphasis added). The Court below's refusal to determine whether these petitioners were a part of the original class *as defined in the class action complaint* thus constitutes a drastic departure from this

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[3] In 1983 – almost four years after the first Agent Orange class action complaints were filed – the district court certified the class and defined it as:

> those persons who were in the United States, New Zealand, or Australian armed forces assigned at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to 'Agent Orange' or other phenoxy herbicides, including those composed in whole or in part of 2, 4, 5,-Trichloro-phenoxyacetic acid . . . The class also includes spouses, parents and children . . . .

100 F.R.D. at 729.

Court's prior precedents. As such, this case is worthy of this Court's attention.

In both *American Pipe* and *Crown, Cork,* this Court emphasized the necessity of reconciling the policies for permitting class actions with the policies which underlie statutes of limitations generally. As the Court observed in *Crown, Cork:*

> Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights, [citations omitted] but these ends are met when the class action *is commenced.* Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims. And a class *complaint* "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *American Pipe,* 414 U.S. at 555.

462 U.S. at 352-53 (emphasis added). In order to correctly serve these policies then, it is proper to look to the definition of the proposed class when "the class action is commenced," – i.e., in the complaint. *Id.* Thus, if these petitioners were members of the class described in the original class complaint, the applicable statutes of limitations would be tolled until certification of the entire class was denied or, as in the instant case, until certification of a different class was granted.

On January 26, 1979, Thomas Edward Skillings filed a class action complaint in the Southern District of New York. J.A.1196. The complaint was filed:

> "On behalf of all those so unfortunate as to have been and now to be similarly situated at risk, from the toxic effects of phenoxy herbicides such as 2,4,5-trichloro-phenoxyacetic acid (2,4,5-T) manufactured, formulated, advertised, promoted, marketed and sold by the corporate defendants herein, individually and collectively although known to be contaminated with the toxic synthetic organic chemical, 2,3,7,8-tetrachlorodibenzo-dioxin (TCDD or "dioxin")."

Id. The class action allegations contained in the complaint also make continued and repeated reference to "*all* of those so unfortunate as to have been similarly situated at risk from the toxic effects of phenoxy herbicides. . ." J.A.1210-20. Thus, while Mr. Skillings himself was a veteran, the class allegations in his complaint made no mention of either Vietnam Veterans or the Vietnam War. The plain intent of this complaint then was to file a class action on behalf of *all* of those people (such as these petitioners) who were similarly exposed to phenoxy herbicides. It can hardly be said that after reading the Skillings complaint, the respondent corporations were not "put on notice of the substantive claims being brought against them. . ." by individuals like these civilian petitioners. 462 U.S. at 353.

Until these petitioners filed their complaints in 1982, the District Court did nothing that would have suggested that these petitioners were not a part of the class described in *Skillings v. Dow.* In fact, the opposite is true. In pretrial order No. 4, the then District Court Judge, The Honorable George C. Pratt, held that

> as stated at the July 18, 1979 oral argument, the Court deems *all* applicable statutes of limitations to have been tolled . . . In light of that ruling, it

> may be unnecessary for additional parties to file new complaints in this litigation.

475 F. Supp. at 937. (emphasis added).

Moreover, in 1980, the District Court issued an opinon conditionally certifying the class. In that opinion, Judge Pratt stated that:

> Here, the plaintiff class can be *readily identified.* They are persons who claim injury from exposure to Agent Orange . . . This court has intentionally defined the class *in broad terms* consistent with the demands of this litigation.

506 F. Supp. at 788.[4] (emphasis added). Though the Court explicitly stated that "it may later prove advantageous to create subclasses," the petitioners below had no reason to believe that class certification had been denied as to them. *Id.* Unfortunately, the District Court never defined any subclasses and, in 1982, the petitioners protectively filed their complaint. In 1983, the district court altered the

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[4] Importantly, the Second Circuit mischaracterized Judge Pratt when it concluded that the Agent Orange class action was one "*brought on behalf of* 'Vietnam War Veterans and members of their families claiming to have suffered damage as a result of the veterans' exposure to herbicides in Vietnam'." 718 F.2d at 214 (App. p. 772a), *citing* 506 F. Supp. 762, 768. (emphasis added). In fact, Judge Pratt in the quoted material simply noted that "Vietnam War Veterans and members of their families . . . *commenced these actions.*" *Id.* (emphasis added). Thus, the more accurate description of Judge Pratt's order is contained in the lead Agent Orange opinion by the Second Circuit:

> . . . Judge Pratt stated his intention to certify a class pursuant to Fed R. Civ P. 23(b)(3) of *persons* who claim injury from exposure to Agent Orange and their spouses, children and parents who claim direct or derivative injury therefrom.

In re "Agent Orange" Product Liability Litigation, 818 F.2d 145, 153 (2d Cir. 1987) (App. p. 691a), *citing* 506 F.Supp. at 718. (emphasis added).

definition of the class to include only veterans and their families and, in 1985, with the benefit of knowing how the class was ultimately defined, the Hawaiian petitioners' claims were dismissed. Surely, this was the anomalous result which this Court wished to avoid when it held that it is the "*commencement of the class action* [that] suspends the applicable statute of limitations as to all asserted members of the class." 414 U.S. at 554.

The importance of granting certiorari to address this issue cannot be overstated. It is an unfortunate fact of twentieth century living that the world is an increasingly dangerous place. Like the victims of Agent Orange, many of our citizens, now and in the future, will be affected by disasters of "epic proportions." 818 F.2d at 212 (App. p. 768a). Whether they are injured by a toxic product, environmental contamination, or any other national calamity, they will look generally to the federal courts and specifically to the class action mechanism for their relief. Since the "Agent Orange" opinions will be treated as the leading precedent for that type of litigation, this Court must give its guidance. This imperative is especially clear where, as here, the Court below expressed confusion about the application of this Court's already established class action rules.

[C] The Second Circuit's Dismissal Of Petitioners' Claims Against The United States (a) Extends The "Discretionary Function" Exception To The Federal Tort Claims Act Beyond The Intent Of That Act And, (b) Conflicts With Decisions Of This Court And Other Circuits.

The Court below dismissed the petitioners' claims against the United States for negligently warning, packaging, labeling and handling of Agent Orange during tests

conducted at the University of Hawaii during the 1960's and 1970's.[5] Even though these activities are operational in nature and involved no high level policy decisions, the Court of Appeals dismissed their claims pursuant to 28 U.S.C. §2680(a) – the so-called "discretionary function" exception to the Federal Tort Claims Act (FTCA). The Court did so based upon a broad reading of this Court's decision in *United States v. S.A. Empresa De Viacao Aerea Rio Grandense ("Varig Airlines")*, 467 U.S. 797 (1984). Unfortunately, in the wake of *Varig*, the Circuits have been hopelessly split with some, like the Second Circuit below, taking a greatly expanded view of §2680(a), and others taking a more moderate view of that exception.[6] Since the decision below views the discre-

[5] The Court of Appeals dismissed these claims although the District Court opinion *never* addressed it. The petitioners believe that the court unjustly deprived the petitioners of their day in court when it decided this case on grounds not fully argued before or addressed by the district court.

[6] *Compare, Allen v. United States*, 816 F.2d 1417 (10th Cir. 1987) (No FTCA liability for Atomic Energy Commission's alleged failure to properly supervise and warn of effects of open-air atomic testing); *Myslakowski v. United States*, 806 F.2d 94 (6th Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S.Ct. 1608 (1987) (no liability for postal service decision to sell used jeeps without warning of jeeps' propensity to tip over); *Ford v. American Motors Corp.*, 770 F.2d 465 (5th Cir. 1985) (same); *Smith v. Johns-Manville Corp.*, 795 F.2d 301 (3d Cir. 1986) (no liability for GSA decision to sell asbestos without warning); *Cisco v. United States*, 768 F.2d 788 (7th Cir. 1985) (no liability for EPA failure to warn residents of land fill dirt contaminated with dioxin) *with, Aslakson v. United States*, 790 F.2d 688 (8th Cir. 1986) (FTCA liability possible for government agent's failure to comply with its already established safety policy); *Henderson v. United States*, 784 F.2d 942 (9th Cir. 1986) (FTCA liability for government missile facility safety decision not made at "the planning stage" but "operational in nature"); *Collins v. United States*, 783 F.2d 1225 (5th Cir. 1986) (FTCA liability possible for failure of Mine Safety and Health Administration to close mine when challenged decisions of subordinates

tionary function exception as swallowing the rule, the Court should review that decision and clarify the meaning of *Varig*.

The FTCA authorizes suits for damages against the United States "where the United States, if a private person, would be held liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b). In such suits, the United States is liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. §2674. The Act, however, did not waive sovereign immunity in all respects. *Varig Airlines,* 467 U.S. at 808. Thus, according to §2680(a), liability will not be imposed for

> Any claim based on an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation . . . *or based upon the performance or the failure to exercise or perform a discretionary function* or duty on the part of a federal agency or employee of the government whether or not the discretion involved be abused.

28 U.S.C. 2680(a) (emphasis added).

As this Court noted in *Varig,* "the discretionary function exception . . . marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." 467 U.S. at 808. Read broadly, as the Second Circuit did, this excep-

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did not involve "policy decisions"); *Alabama Electric Cooperative v. United States,* 769 F.2d 1523 (11th Cir. 1985) (FTCA liability possible for "operational decisions" of Army Corps of Engineers in constructing river dikes).

tion knows no boundary. Indeed, it swallows the rule. *See Collins v. United States,* 783 F.2d at 1320. For example, the stopping of a government truck at a stop sign involves *some* degree of choice and judgment – discretion in its broadest sense. Obviously, this is not the sort of activity the exception was designed to protect. *Dalehite v. United States,* 346 U.S. 15, 34 (1953). "Plainly, there is a need for the Courts to sort the intrinsically discretionary from the truly operational if the FTCA is to have any meaning whatsoever." *Alabama Electric,* 769 F.2d at 1526-28.

In defining the breadth of the discretionary function exception, this Court has focused on two factors. "First, it is the nature of the conduct, rather than the status of the actor which governs." 467 U.S. at 813; *See also Dalehite,* 346 U.S. at 33. "Second," according to this Court, the exception was meant to exempt "the discretionary acts of the government acting in its role as a regulator of the conduct of private individuals." 467 U.S. 813-14. Thus, by adopting the discretionary function exception, Congress wished to prevent "judicial 'second guessing' of the legislative and administrative *decisions* in social, economic and political policy through the medium of an action in tort." *Id.* at 814 (emphasis added). The only fair reading of *Varig,* especially in light of past decisions of this Court, is that a distinction must be made between that which is "planning" (not actionable) and that which is "operational" (and thus, actionable). *See Indian Towing Company v. United States,* 350 U.S. 61 (1955). When that distinction is understood, "*Varig Airlines* . . . supports [a] planning-operational distinction." *Alabama Electric,* 769 F.2d at 1528.

The planning-operational distinction had its genesis in the *Indian Towing* case. There, the plaintiff had alleged negligence for the operation of a coastal light. After considerable discussion of the history of the discretionary

function exception and the *Dalehite* case, the Court held that:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to make certain that the light was kept in good working order; and if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty . . . the United States is liable under the [FTCA].

Id. at 79; *See also Rayonier, Inc. v. United States,* 352 U.S. 315 (1957). Thus, this Court illustrated how the government can be held liable for those activities where the government is acting on an operational level and not "acting in its role as a regulator of the conduct of private individuals." *Varig,* 467 U.S. at 813-14.

In this case, petitioners do not question the decision of the government to test the usefulness of Agent Orange. The petitioners do claim that *once* the decision was made to test Agent Orange, the United States had a duty to carry out that decision prudently. The failure to instruct, warn, or properly package a highly toxic substance is clearly not "a policy judgment or decision" within the meaning of §2680(a). *Dalehite,* 346 U.S. at 36. Thus, the actions complained of are not the types of activities intended to be shielded from liability under the FTCA.

Because the Second Circuit would read *Varig Airlines* as rejecting the operational-planning level distinction implicitly recognized in cases such as *Indian Towing,* and

because there is a confusion between the circuits as to the meaning of *Varig,* this Court should review the decision below.

[II] DOCTOR GERALD HOGAN

[A] The Second Circuit Violated Doctor Hogan's Fifth Amendment Rights When It Affirmed The District Court's Dismissal Of His Complaint Pursuant To Rule 37(b) Of The Federal Rules Of Civil Procedure For The Purpose Of Deterring Others From Disobeying A Discovery Order.

The Circuit Court below has upheld the District Court's Rule 37(b) dismissal of Petitioner Gerald Hogan's complaint. It did so on the grounds that Dr. Hogan purportedly "refused to continue" his deposition. 818 F.2d at 212 (App. p. 768a). Thus, despite the fact that petitioner complained of cardiac arrhythmia after two and one half hours of deposition and even though Dr. Hogan expressly stated his desire to continue his deposition at a later date, the District Court felt justified in applying Rule 37's "most drastic sanction" – dismissal. *Flaks v. Koegel,* 504 F.2d 702, 708 (2d Cir. 1974). Moreover, the Court below affirmed that dismissal not necessarily because Dr. Hogan's actions themselves warranted dismissal, but because it felt compelled to deter others from disobeying a discovery order. *Id.* (App. p. 768a-69a). Because the Second Circuit's application of Rule 37(b) is unprecedented and because it conflicts with the already deferential guidelines set out by this Court, full review is warranted.

In seeking review, petitioner is not unmindful of this Court's admonition that a reviewing Court, "employing the benefit of hindsight", should resist the tendency to be "influenced by the severity of outright dismissal as a sanc-

tion for failure to comply with a discovery order." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). There must, however, be a point beyond which discretion may not be exercised. This point, petitioner urges, is defined in this Court's opinion in *Societe Internationale v. Rogers,* 357 U.S. 197, 212 (1958). There, this Court held that Rule 37

> Should not be construed to authorize dismissal of [a] complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to an *inability, and not due to willfulness, bad faith or any fault. . .*

Id. at 212 (emphasis added); *See also National Hockey,* 427 U.S. at 640. Thus, while a judge might properly consider the deterrent value of a Rule 37 dismissal, *Id.*, he must not do so without reference to the *individual litigant's motivation* for not complying with the pretrial production order. 357 U.S. at 209. Accordingly, without a finding of "willfulness, bad faith or . . . fault," a Rule 37 dismissal unjustly deprives an individiual of his day in court — a property right guaranteed by the due process clause of the Fifth Amendment. *Id., See also Charter House Ins. Brokers v. New Hampshire Ins.*, 667 F.2d 600 (7th Cir. 1981).

This case illustrates why this Court has held that judicial discretion in imposing Rule 37 sanctions is not unfettered. Petitioner, who for health reasons is confined to living in the desert Southwest, had his deposition taken at his home outside Las Vegas, Nevada, on March 21, 1985. After approximately two and one half hours, petitioner complained of cardiac arrhythmia and requested that his deposition be temporarily adjourned. J.A. 11473-74. In support of this condition, petitioner subsequently supplied the magis-

trate controlling discovery with testimony of a prior treating physician who stated that continuing the deposition would be injurious to his physical and mental health.[7] Upon the respondent's request, petitioner submitted to a physical examination in which it was determined that, despite certain admitted physical problems, the deposition could be continued. Based on this, the magistrate ordered resumption of the deposition. The petitioner continued to complain of serious health problems and declined to be deposed although, importantly, he did specifically ask for six weeks to recuperate. J.A. 14743-44. Upon the respondents' motion, however, dismissal was granted.

From these facts, it is clear that petitioners' conduct could not have risen to the level of "willful, bad faith or fault" required by this Court. Conspicuously, the Court of Appeals below did not even discuss that standard. Rather, it merely noted that the "disposition of the almost unprecedented number of Agent Orange cases would be indeterminably delayed if the participants were permitted to disobey court orders without sanction."[8] 818 F.2d at 212 (App. p. 768a).Thus, while in less complex litigation, the

[7] Indeed, at a hearing before the magistrate, one of respondents' counsel confessed that "I think it was clear, at least to defense counsel, that regrettably Dr. Hogan is suffering from certain mental disabilities as well as perhaps certain physical disabilities and I have some questions as to his mental state as well as his physical state." J.A. 14575.

[8] In fact, when the district court dismissed Dr. Hogan's Complaint, the "volume of Agent Orange cases" were no longer "unprecedented." Over 99.9 percent of the Agent Orange cases had been settled in 1983 as part of the class settlement and all that remained were the opt-out plaintiffs and the civilian plaintiffs. Thus, even if it is proper to use a "sliding scale" approach to Rule 37(b) sanctions which is dependent on the magnitude of the litigation, such an approach is misplaced here. Since most discovery had been completed by 1983, the only deterrent that Dr. Hogans' dismissal would have would be in future "epic" cases.

petitioner might have been given a less final sanction, in the context of "litigation of epic proportions," dismissal was justified. *Id.* Petitioner does not dispute that this litigation is indeed "epic." However, the magnitude of litigation is no excuse to disregard Dr. Hogan's understandable conduct and the standard of willfulness or bad faith required by this Court. Without such a showing, there are obvious "constitutional obstacle(s) to depriving a litigant of his day in Court." *Charter House,* 667 F.2d at 605. The Circuit Court's complete disregard of the standard set forth in *Societe Internationale* and *National Hockey* warrant this Court's review and reversal.

III. CONCLUSION

The United States Court of Appeals for the Second Circuit has described these Agent Orange cases by using various adjectives from "extraordinary" to "epic." Such descriptions aptly describe the many aspects of this litigation, not the least of which is the impact that Agent Orange has had on a whole generation of individuals, both military and civilian, who have been adversely affected by it. The legacy of these cases, however, is not so confined. With the unfortunate inevitablity of other large scale disasters, other courts will have to struggle with the very same issues which confronted the Court below. It is in that crucial respect that Agent Orange will have a life of its own. The opinions below will be followed, perhaps blindly, even where the court below showed a preference for efficiency and expediency over well established legal principles. It is precisely because such a preference was shown and because of the inevitable precedential weight that will be given to this case, that the errors below should be corrected.

For the reasons stated above, this Petition For Certiorari should be granted. Petitioner preserves questions V and VI, not as reasons for granting the Writ, but because they formed an integral part of the decision below. The issue of causation, which had been addressed by the District Court, was specifically not addressed by the Second Circuit. Moreover, the propriety of the military contractor defense, which the Second Circuit found dispositive of all claimants except those who remained in the class, is presently before this Court in *Boyle v. United Technologies Corp.*, 792 F.2d 413 (4th Cir. 1986), *cert. granted,* 107 S.Ct. 872 (1987), *Shaw v. Grumman Aerospace Co.*, 778 F.2d 736 (11th Cir. 1986) *cert. pending, Tozer v. LTV Corporation,* 792 F.2d 403 (4th Cir. 1987) *cert. pending,* and in the Agent Orange petition for the "opt out" plaintiffs filed on the same date as this petition. If the petitioners herein are correct in asserting that the complaints below were improperly dismissed, then this matter should be remanded to the Court of Appeals for consideration of the causation issue and for reconsideration of the military contractor defense.

Respectfully submitted,

By _____

WAYNE MICHAEL MANSULLA
(Counsel of Record)
CHIRSTOPHER VINCENT TISI
ASHCRAFT & GEREL
2000 L Street, Suite 700
Washignton, D.C. 20036

Counsel for Petitioners

Dated: Washington, D.C.
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APPENDIX OF STATUTES AND RULES

The Relevant Rules and Statutory Provisions involved are:

Rule 23(c)(1) of the Federal Rules of Civil Procedure provides:

> (c) **Determination by Order Whether Class Action to Be Maintained; Notice; Judgement; Actions Conducted Partially as Class Actions.**
>
> (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

Rule 37(b) of the Federal Rules of Civil Procedure provides that:

> (b) **Failure to Comply with Order.**
>
> (i) **Sanctions by Court in District Where Deposition is Taken.** If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.
>
> (ii) **Sanctions by Court in Which Action Is Pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order or provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under

Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foreging orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including at-

torney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Section 1346(b) of the Federal Tort Claims Act provides:

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2674 of the Federal Tort Claims Act provides:

28 USC §2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed

to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

Section 2680(a) of the Federal Tort Claims Act provides:

The provisions of this chapter and section 1346(b) of this title shall not apply to —

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.